No. 92-515

In The

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN, *Petitioner,*

v.

TODD MITCHELL, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, ET AL., AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

ANGELO N. ANCHETA*
KATHRYN K. IMAHARA
ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIFORNIA
1010 South Flower Street, Suite 302
Los Angeles, California 90015
Telephone: (213) 748-2022
Facsimile: (213) 748-0679

KAREN K. NARASAKI
JAPANESE AMERICAN CITIZENS LEAGUE
1001 Connecticut Avenue, N.W., Suite 704
Washington, D.C. 20036

DOREENA P. WONG
ASIAN LAW CAUCUS, INC.
468 Bush Street, 3rd Floor
San Francisco, California 94108

STANLEY MARK
ELIZABETH OUYANG
ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND
99 Hudson Street, 12th Floor
New York, New York 10013

* *Counsel of Record*

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BRIEF OF THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, AMERICAN CITIZENS FOR JUSTICE, THE ASIAN LAW ALLIANCE, CHINESE FOR AFFIRMATIVE ACTION, THE CHINESE AMERICAN CITIZENS ALLIANCE, THE JAPANESE AMERICAN CITIZENS LEAGUE, AND THE NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, the National Asian Pacific American Legal Consortium, American Citizens for Justice, the Asian Law Alliance, Chinese for Affirmative Action, the Chinese American Citizens Alliance, the Japanese

American Citizens League, and the National Asian Pacific American Bar Association submit this brief as *amici curiae* in support of the petition for a writ of certiorari. Counsel for both parties have consented to the submission of this brief; letters of consent have been filed with the Clerk of the Court.

The *amici curiae* are organizations dedicated to the protection of civil rights for the Asian and Pacific Islander communities in the United States. All *amici* have advocated for the passage of hate crime legislation, and are active members of the National Network Against Anti-Asian Violence, a coalition of organizations that monitor and respond to incidents of hate violence throughout the country.

The National Asian Pacific American Legal Consortium (NAPALC) is a nonprofit, nonpartisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans through a national collaborative structure that pursues litigation, advocacy, public education, and public policy development. NAPALC is composed of three organizations based in major urban areas with significant Asian and Pacific Islander populations: the Asian American Legal Defense and Education Fund (New York), the Asian Law Caucus, Inc. (San Francisco), and the Asian Pacific American Legal Center of Southern California (Los Angeles).

Founded in 1974, the Asian American Legal Defense and Education Fund is a civil rights organization that addresses critical issues facing Asian Pacific Americans through community education, advocacy, and litigation. Program priorities include the elimination of anti-Asian violence, advancement of immigrant rights, employment and labor rights, and redress for Japanese American World War II internees.

The Asian Law Caucus, Inc. is a nonprofit, public interest legal organization whose mission is to promote, advance, and represent the civil rights of Asian and Pacific Islander communities. Since 1972, it has provided free and low-cost

multilingual legal services, community education, and general advocacy in the areas of immigration, housing, employment and labor, and civil rights, including discriminatory hate violence. In recognition of the growing problem of anti-Asian violence, the Hate Violence Project was created to develop and implement a comprehensive program to assist Asian victims and to reduce the incidence of hate violence through legal assistance, community education, public policy, and advocacy.

The Asian Pacific American Legal Center of Southern California is a nonprofit legal organization dedicated to serving the Asian communities through direct services, community education, leadership development, and advocacy. Founded in 1983, it provides multilingual legal and educational services, with programs focusing on immigration, family law, language rights, interethnic relations, dispute resolution, and civil rights advocacy.

One of the main goals of NAPALC has been to promote racial harmony and to eradicate ethnic and racial violence towards Asian communities. All three organizations comprising NAPALC have extensive knowledge and experience dealing with the issue of hate violence, particularly as it pertains to Asians.

American Citizens for Justice, Inc. (ACJ), was created in 1983 as a coalition of Asian Pacific Americans and other concerned individuals in the Detroit, Michigan and Midwest areas to address anti-Asian violence. The Asian American Center for Justice, the professionally staffed office of ACJ, provides services in legal consultation and education, monitoring anti-Asian violence, advocacy, and community education. ACJ has advocated for the constitutionality of ethnic intimidation statutes in the State of Michigan and throughout the country.

The Asian Law Alliance of Santa Clara County (ALA) is a nonprofit legal services agency serving the Asian and

Pacific Islander communities, particularly low-income and limited-English-speaking refugees and immigrants since 1977. ALA offers free and low-cost legal representation, preventive community education, advocacy, and outreach in a variety of Asian languages. Its programs prioritize issues related to government benefits, immigration, housing, family law/ domestic violence, and civil rights, including hate crimes.

Founded in 1969, Chinese for Affirmative Action (CAA) is a voluntary membership-supported organization dedicated to promote equality and justice for Asian Americans. CAA was instrumental in the 1987 formation of the Asian American Advisory Committee to the California Attorney General, to address the rising tide of anti-Asian hostility in California, as well as other criminal justice problems in the Asian and Pacific Islander communities. The organization has rendered assistance to individuals who have been victims of racial hatred and discrimination, and, at the request of Asian Americans in diverse neighborhoods, has worked with individuals and public officials to reduce the level of intergroup tension.

The Chinese American Citizens Alliance (CACA) is the nation's oldest Asian American civil rights organization, established since 1895 to uphold equal rights for Chinese Americans. As a national membership-supported nonpartisan organization, CACA has participated in various challenges to legal actions that have impacted the Chinese American and Asian American community. CACA has consistently advocated for the passage of various hate crime laws and provided on-going hate crime awareness programs for the Chinese American community.

The Japanese American Citizens League (JACL) is the largest Asian American civil and human rights organization in the United States, consisting of 113 chapters nationwide. Established as a non-profit organization in 1929, JACL has participated, either as a party or as *amicus curiae*, in various legal actions which have challenged racial prejudice and

discrimination against Japanese Americans and other Asian Americans. JACL has advocated for, and supported, passage of various hate crime statutes, and monitors incidents of discriminatory hate violence.

The National Asian Pacific American Bar Association (NAPABA) is a nationwide, nonprofit, nonpartisan organization of Asian Pacific American attorneys. Founded in 1989, NAPABA has over 2500 members and is dedicated to serving the needs of Asian Pacific American attorneys and their communities. Since its inception, stemming the rising tide of racial violence, particularly anti-Asian violence, has been one of NAPABA's top priorities. It has produced education materials on racial violence, and its members have testified on behalf of hate crime legislation and have been available as a resource to victims, families of victims, and communities affected by incidents of hate crimes.

This case, and a similar case on petition for a writ of certiorari, *Ohio v. Wyant*, No. 92-568, raise issues of significant concern to *amici curiae* and the individuals they represent.* While *amici* are vigorous defenders of civil liberties and the freedom of speech, *amici* believe that legislative efforts such as the Wisconsin and Ohio enhancement statutes are necessary in the fight to deter racial violence. Violent threats and acts that intimidate or interfere with another person's free exercise or enjoyment of rights secured under the Constitution or laws of the United States or of the individual states because of the victim's membership in a protected class are simply not protected speech.

**Amici curiae* were unable to submit a brief in support of the petition for a writ of certiorari in *Ohio v. Wyant*, No. 92-568, and therefore request that the Court consider this brief in support of Petitioner, the State of Ohio, and consolidate the *Wyant* case with the instant case. *Amici* believe that both cases involve similar hate crimes enhancement statutes and both involve erroneous interpretations of state law and of the First Amendment.

INTRODUCTION

Discriminatory violence -- violent threats and acts perpetrated against certain protected groups in society -- has been occurring with increasing frequency and severity throughout the country, causing devastating effects on victims, as well as society as a whole. Anti-Asian violence in particular has become a widespread and well recognized problem. *See* U.S. Comm'n on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990's* 22 (1992).

Because of the invidious nature of hate crimes, numerous state legislatures have enacted laws that protect targeted groups such as racial minorities, including Asians and Pacific Islanders. Many states have adopted "enhancement" statutes that authorize the imposition of more severe sentences on criminals whose crimes were committed because of discriminatory intent. In 1992, the United States House of Representatives passed a similar statute aimed at addressing the problem on a federal level. H.R. 4797, 102d Cong., 2d Sess. (1992).

However, because of the uncertainty regarding the applicability of this Court's recent decision in *R.A.V. v. City of St. Paul,* 112 S. Ct. 2538 (1992), to these types of statutes, legislators have become hesitant about introducing new legislation, and law enforcement officials appear to be wary about enforcing existing laws. Granting the petition for a writ of certiorari in the instant case, as well as in a companion case, *Ohio v. Wyant*, No. 92-568, would give this Court the opportunity to provide guidance to legislators and law enforcement officials throughout the country.

Moreover, several state courts have upheld, or are currently reviewing, on First Amendment grounds hate crime penalty enhancement statutes similar to the Ohio and Wisconsin statutes challenged in these cases. If the Court grants the petitions for writs of certiorari, it will have an opportunity to resolve a conflict among the state courts regarding the constitutionality of hate crime enhancement statutes.

ARGUMENT

I. DISCRIMINATORY VIOLENCE IS A SERIOUS AND PERVASIVE NATIONAL PROBLEM

Hate violence directed against victims because of their immutable characteristics is a particularly egregious violation of their civil rights. Violence perpetrated against a person because of membership in a vulnerable group not only affects the victim, but traumatizes the community of which the victim is a member. *See State v. Plowman,* No. S38328 (Or. Aug. 27, 1992); *State v. Beebe,* 67 Or. App. 738, 741, 680 P.2d 11, 13 (1984); Matsuda, *Public Response to Racist Speech: Considering the Victim's Story,* 87 Mich. L. Rev. 2320, 2335-41 (1989); Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling,* 17 Harv. C.R.-C.L. L. Rev. 133, 135-36 (1982).

Acts of discriminatory violence, including acts of anti-Asian violence, are on the rise. In Los Angeles County, for example, from 1989 to 1990, there was a 146% increase in the total number of hate crimes (550 incidents), and a 65% increase in racially based hate crimes (275 incidents). Moreover, there was also an increase of 257% to 49 incidents, or 17.8% of the total, which were directed at Asians. L.A. County Comm'n on Human Relations, *Hate Crime in Los Angeles County 1990,* at Summary, 2, 7 (1991). From 1990 to 1991, there was a 27% increase in the total number of racially discriminatory hate crimes and a 22% increase in the total number of overall hate crimes, the highest number of such acts ever recorded. L.A. County Comm'n on Human Relations, *Hate Crime in Los Angeles County 1991,* at 1 (1992). Out of the total of 351 racially related hate crimes, fifty-four, or 15.1%, were directed at Asian Pacific Americans. *Id.* at 1-2. Nationwide, the Department of Justice reported an increase of 62% in hate crimes perpetrated against Asians within a one year period. Yamauchi, *For Asian Americans, U.S. Climate of 90's is More Hostile*, The

Monitor, May 1990, at 13.

Hate violence against Asian Pacific Americans and other protected groups has run the gamut from racial slurs and graffiti to beatings, shootings, and killings. Recently, for example, on August 21, 1992, a nineteen-year-old Vietnamese student was brutally beaten to death in Coral Springs, Florida. The pre-medical student attended a surprise party with his friends and was taunted with racially derogatory remarks about his Asian ancestry. A gang of fifteen young men chased him down like a "hunted deer" and beat him to death. *Bias-Incited Beating Death of a Vietnamese Stuns a Florida Town*, N.Y. Times, Aug. 23, 1992.

In fact, the viciousness and severity of hate violence incidents has been growing. A recent article revealed that scientists have found that hate crimes are "far more lethal than other kinds of attacks, resulting in the hospitalization of their victims four times more often than is true for other assaults. . . . Half [of the bias incidents] involved assaults. Of these, the victims were injured in 74 percent of the cases; the national average for injury to an assault victim is 29 percent. More telling, at least one victim required hospitalization in 30 percent of the prejudice-based assaults, while for other assaults the average rate of injuries that severe is 7 percent." Goleman, *As Bias Crimes Seem to Rise, Scientists Study Roots of Racism*, N.Y. Times, July 10, 1990, § C, at 1, col. 1.

II. PENALTY ENHANCEMENT LAWS ARE NECESSARY TO PREVENT AND PUNISH DISCRIMINATORY VIOLENCE

As a response to the growing and widespread problem of discriminatory violence, state and local governments across the country have enacted statutes that monitor hate crimes and prohibit specific acts of violence, intimidation, and coercion. *See* Anti Defamation League of B'nai B'rith, *Hate Crimes Statutes: A 1991 Report*, at 1-2, 22 (1991); Nat'l Inst.

Against Prejudice & Violence, *Striking Back at Bigotry: Remedies Under Federal and State Laws for Violence Motivated By Racial, Religious, and Ethnic Prejudice* 61-65 (1986 & Supp. 1988). The United States Congress has also recognized the gravity of the problem and has passed the Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified at 28 U.S.C.A. § 534 (1992)), to monitor and collect data on hate crimes at the national level.

Laws that specifically address the problem of discriminatory violence communicate to individuals who would commit acts of violence that the local community or state does not tolerate such acts. These laws also encourage the police to act with particular dispatch in handling discriminatory hate crimes. As the United States Civil Rights Commission has noted: "Effective police responses to incidents of racial and religious violence are necessary to keep such incidents from spreading. If the police fail to respond, or respond in ways that clearly demonstrate a lack of sensitivity, perpetrators can interpret the police activity as official sympathy or even sanction." U.S. Comm'n on Civil Rights, *Intimidation and Violence: Racial and Religious Bigotry in America* 17-18 (1990).

III. PENALTY ENHANCEMENT STATUTES APPLYING TO DISCRIMINATORY VIOLENCE ARE CONSTITUTIONAL

This Court has long held that conduct lacking expressive elements does not enjoy constitutional protection. *Spence v. Washington*, 418 U.S. 405, 409 (1974). Most clearly, conduct that rises to the level of violence against person or property is exempt from constitutional shelter: "The First Amendment does not protect violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982). And, "like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, [discriminatory] practices are entitled to no constitutional protection."

Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984).

Moreover, this Court has held that judges may consider and use an offender's motivation in committing a crime as a basis for increasing the sentencing for a crime. *See Dawson v. Delaware,* 112 S. Ct. 1093 (1992); *Barclay v. Florida,* 483 U.S. 939 (1983). Penalty enhancement statutes provide more consistency in sentencing because discriminatory intent must be proved and judges are instructed as to how much weight to give such intent.

The Wisconsin law at issue is a criminal enhancement statute. Wis. Stat. Ann. § 939.645 (West Supp. 1992). It augments the punishment of predicate crimes defined in other laws. The statute is also an antidiscrimination law. Like other antidiscrimination laws, it expresses the legislative intent that certain groups in society suffer from discrimination and require special protection; therefore, discriminatory acts against individuals who are members -- or perceived to be members -- of those groups are unacceptable and must be punished accordingly.

The language of the Wisconsin statute parallels the language found in both civil and criminal antidiscrimination laws. For example, Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on the employee's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a) (1988). Individuals who are not hired *because of* their race, individuals who receive less pay *because of* the color of their skin, individuals who are not promoted *because of* their religion, individuals who are harassed *because of* their sex, individuals who are discharged *because of* their national origin -- all the individuals in these situations and in numerous permutations are protected by Title VII from illegal discrimination. *See also* 42 U.S.C. §§ 1981, 1982.

In the criminal context, the federal criminal civil rights

law codified at 18 U.S.C. Section 242 prohibits violent acts committed against another person "by reason of his color, or race." 18 U.S.C. § 242 (1988). The law is derived from the Civil Rights Act of 1866, whose purpose was "to protect all persons in the United States in their civil rights and furnish means of vindication. In origin it was an antidiscrimination measure (as its language indicated), framed to protect Negroes in their newly won rights." *Screws v. United States,* 325 U.S. 91, 98-99 (1945).

The Wisconsin statute, section 939.645, reflects the state legislature's determination that violent acts committed with discriminatory intent are more reprehensible than the same acts committed without discriminatory intent, just as firing someone from a job or denying them a loan or an apartment in which to live is more reprehensible when done for discriminatory reasons. The argument that penalty enhancement statutes such as section 939.645 punish biased thought and motive thus misses the basic point of hate crimes legislation. Hate crime statutes do not punish a perpetrator's thoughts; such statutes punish the discrimination committed against another person through a violent act.

IV. THE WISCONSIN SUPREME COURT ERRED BY HOLDING THAT SECTION 939.645 IS UNCONSTITUTIONAL, AND IS IN THE MINORITY OF STATE COURTS ADDRESSING SIMILAR STATUTES

Various courts have recognized the special nature of discriminatory acts of violence and rejected constitutional challenges to hate crimes legislation. For example, in *State v. Beebe,* 670 Or. App. 738, 680 P.2d 11 (1984), an Oregon appellate court upheld the constitutionality of a statute that enhanced penalties for racial violence. Noting the special problem of increased societal dangers resulting from discriminatory violence, the court stated: "Such confrontations therefore readily -- and commonly do -- escalate from

individual conflicts to mass disturbances. That is a far more serious potential consequence than that associated with the usual run of assault cases." *Id.* at 13. Holding that the statute was constitutional because it regulated conduct and not speech, the court stated: "The legislature may legitimately determine that the danger to society from assaultive conduct directed toward and individual because his race, religion or national origin is greater than behavior under other circumstances." *Id.*

More recently, in *State v. Plowman,* No. S38328, slip. op. at 10-11 (Or. Aug. 27, 1992), the Oregon Supreme Court upheld a challenge to the state's intimidation statute, stating:

> In enacting the intimidation statute, the legislature determined that . . . causing physical injury to a victim because of the perception that the victim belongs to one of the specified groups creates a harm to society distinct from and greater than the harm caused by the assault alone. Such crimes -- because they are directed not only toward the victim but, in essence, toward an entire group of which the victim is perceived to be a member -- invite imitation, retaliation, and insecurity on the part of persons in the group to which the victim was perceived by the assailants to belong.

The court went on to reject the argument that the Oregon statute offended the First Amendment by punishing a defendant's opinion: "Rather than proscribing opinion, that law proscribes a forbidden effect: the effect of acting together to cause physical injury to a victim whom the assailants have targeted because of their perception that the victim belongs to a particular group. . . . Put differently: One may hate members of a specified group all one wishes, but still be punished constitutionally if one acts together with another to cause physical injury to a person because of that person's perceived membership in the hated group." *Id.* at 10; *see also Kinser v.*

State, 591 A.2d 894 (Md. 1991); *State v. Hendrix,* 107 Or. App. 734, 813 P.2d 1115 (1991); *People v. Grupe,* 141 Misc. 2d 6, 532 N.Y.S.2d 815 (1988).

However, two state supreme courts have recently struck down penalty enhancement statutes as unconstitutional, arguing that the statutes punished "motive" and regulated "thought." In the instant case, the Wisconsin Supreme Court overturned the state's antidiscrimination criminal enhancement statute on the grounds that it "violates the First Amendment directly by punishing what the Legislature has deemed to be offensive thought and indirectly by chilling free speech." *State v. Mitchell,* 169 Wis. 153, 485 N.W.2d 807, 811 (1992). Establishing a distinction between the defendant's criminal act and the defendant's motives for committing the act, the *Mitchell* court majority found that the statute punished the defendant's biased motives through the sentence enhancement and thus unnecessarily infringed upon his First Amendment rights.

Relying on *Mitchell,* the Ohio Supreme Court held that the Ohio enhancement statute also criminalized motive and thought in violation of the First Amendment. *State v. Wyant,* 1992 Ohio LEXIS 1837. The court stated: "Once the proscribed act is committed, the government criminalizes the underlying thought by enhancing the penalty based on viewpoint. This is dangerous. If the legislature can enhance a penalty for crimes committed 'by reason of' racial bigotry, why not 'by reason of' opposition to abortion, war, the elderly (or any other political or moral viewpoint)?" *Id.* at *23.

In both cases, the courts wrongly interpreted the statutes by attempting to divorce the physical act of violence from the motivation of the actor. *Mitchell, supra,* 485 N.W.2d at 817; *Wyant, supra,* 1992 Ohio LEXIS 1837 at *18. Focusing on *motive* rather than on the *intent* that attaches to the act of violence completely misdirects the inquiry in evaluating hate

crimes legislation. As in other crimes, the actor's motive per se is not relevant in an act of discriminatory violence. A person may attack a member of a racial minority group for any number of reasons: intolerance and xenophobia toward people who are different from oneself, vengeance arising from the effects of economic competition, latent hostility rooted in past military conflict, or simply, overt hatred of another race. However, it is the *intent to commit a violent act against a member of a protected group* that must be examined, not the defendant's motive; in other words, criminal liability rests not on motivation but on proof that the defendant has committed an act of violence *because of* the victim's membership in a protected class.

Correctly focusing on the discriminatory intent of the defendant demonstrates that there is no real difference between a hate crimes statute and another antidiscrimination law that punishes actions based on discriminatory intent. Employment laws punish acts of employment discrimination; housing laws punish acts of housing discrimination; educational laws punish acts of educational discrimination. Hate crimes statutes do no more and no less: they punish acts of criminal discrimination -- discriminatory violence.

V. THIS COURT SHOULD RESOLVE THE CONFUSION IN THE STATE COURTS REGARDING THE CONSTITUTIONALITY OF HATE CRIMES STATUTES

As noted earlier, there are conflicting decisions among the state high courts regarding the constitutionality of their hate crimes statutes. In the wake of this Court's decision last term in *R.A.V. v. City of St. Paul*, challenges to state hate crimes statutes are now pending in courts throughout the country. Several state supreme courts are currently reviewing the constitutionality of hate crimes statutes. *See, e.g., State v. Stalder*, 599 So. 2d 1280 (Fla. 1992) (reviewing trial court decision striking down Florida's hate crimes enhancement

statute as unconstitutional); *State v. LaDue*, No. 91-313 (Vt. 1992) (reviewing district court decision upholding Vermont's hate crime enhancement statute). Other challenges are making their way up to the state supreme courts and are pending in trial and lower appellate courts. In California, for example, there are three cases that will be decided by the Court of Appeal in the near future. *People v. Joshua*, No. H008944 (Cal. Ct. App. 6th Dist. 1992) (challenging California misdemeanor penalty enhancement statute, Cal. Penal Code § 422.7); *People v. Mearra S.*, No. A055072 (Cal. Ct. App. 1st Dist. 1992) (challenging California substantive hate crimes statute, Cal. Penal Code § 422.6, and penalty enhancement statute, Cal. Penal Code § 422.7); *Schwartz v. Superior Court*, No. A059514 (Cal. Ct. App. 1st Dist. 1992) (challenging misdemeanor and felony penalty enhancement statutes, Cal. Penal Code §§ 422.7, 422.75).

By granting the petition for writ of certiorari in *Mitchell* as well as in *Wyant*, this Court has the opportunity to correct the erroneous decisions of the state courts and to clarify the conflicting decisions regarding hate crimes statutes. Statutes such as Wisconsin's section 939.645 are constitutional and must be upheld.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari in the instant case, as well as in the case of *Ohio v. Wyant*, No. 92-568, to consolidate the cases and to reverse the state supreme court decisions holding hate crime penalty enhancement statutes to be unconstitutional.

Respectfully submitted,

ANGELO N. ANCHETA
Counsel of Record
KATHRYN K. IMAHARA
ASIAN PACIFIC AMERICAN LEGAL
CENTER OF SOUTHERN CALIFORNIA
1010 South Flower Street, Suite 302
Los Angeles, California 90015
Telephone: (213) 748-2022
Facsimile: (213) 748-0679

DOREENA P. WONG
ASIAN LAW CAUCUS, INC.
468 Bush Street, 3rd Floor
San Francisco, California 94108

STANLEY MARK
ELIZABETH OUYANG
ASIAN AMERICAN LEGAL
DEFENSE AND EDUCATION FUND
99 Hudson Street, 12th Floor
New York, New York 10013

KAREN K. NARASAKI
JAPANESE AMERICAN CITIZENS LEAGUE
1001 Connecticut Avenue, N.W.,
Suite 704
Washington, D.C. 20036

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